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July 17, 2003

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110

Re: Massachusetts Electric Company and Nantucket Electric Company, D.T.E. 03-67

Dear Secretary Cottrell:

On February 27, 2003, Massachusetts Electric Company and Nantucket Electric Company (collectively "MECo" or "Company" or "National Grid") asked the Department of Telecommunications and Energy ("Department") to approve amendments to two standard offer wholesale contracts executed on December 21, 1998, by Eastern Edison Company and Constellation Power Source, Inc. ("Constellation").[1] In addition, MECo seeks approval from the Department to charge its customers approximately $3.2 million/year in additional standard offer wholesale costs through its Standard Offer Adjustment Provision.

The Department should deny MECo's attempt to change jurisdiction over the standard offer contracts and impose $3.2 million/year in additional costs on standard offer customers. Under the express terms of the Eastern Edison and Montaup Electric Company ("Montaup") Restructuring Settlement Agreement approved in D.P.U. 96-24 and the Settlement Agreement in D.P.U./D.T.E. 97-105, the Federal Energy Regulatory Commission ("FERC"), not the Department, has jurisdiction over the proposed amendments.

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[1] These agreements were originally entered into by Eastern Utility Associates, Inc. ("EUA"), a public utility holding company. Eastern Edison Company in Massachusetts and Blackstone Valley Electric Company and Newport Electric Corporation in Rhode Island (collectively "Eastern" were wholly-owned distribution subsidiaries of EUA. Montaup Electric Company was a wholly-owned generation subsidiary of Eastern Edison Company. (Montaup was a direct subsidiary of Eastern Edison Company and an indirect subsidiary of EUA. The National Grid companies are the successors in interest to EUA. *See Massachusetts Electric Company/New England Power Company/Eastern Edison Company*, D.T.E. 99-47 (2000) (merger approval).

I. Background

Eastern Edison originally executed four wholesale standard offer service agreements: (1) Agreement between Eastern Edison and TransCanada Power Marketing, Ltd., entered into on April 7, 1998; (2) Agreement between Eastern Edison and NRG Energy Power Marketing, entered into on October 13, 1998; and (3) two Agreements between Eastern Edison and Constellation Power Source, Inc., both entered into on December 21, 1998. *Eastern Edison Company/Montaup Electric Company*, D.P.U./D.T.E. 97-105, p. 2 (1999). The Standard Offer Agreements were negotiated pursuant to the Restructuring Settlement Agreements, which were reviewed and approved by the Department in D.T.E. 96-24 and the Federal Energy Regulatory Commission ("FERC") in Docket Nos. ER97-2800-000, ER97-3127-000 and ER97-2338-000 and are an integral part of the approvals granted by FERC in allowing Montaup to terminate its all-requirements contract with Eastern. FERC has continuing jurisdiction with respect to these Standard Offer Agreements. D.P.U./D.T.E. 97-105, p. 8, 15.

In support of its application, MECo alleges that the Eastern Edison/Constellation wholesale standard offer contracts "contain 'unique language' not found in any of the Company's other Standard Offer agreements."[2] Petition, p. 2. The proposed Amendment arises from a contract interpretation dispute between the Company and Constellation regarding delivery point and related congestion cost obligations on the New England Power Pool ("NEPOOL") Pool Transmission Facilities ("PTF"). Apparently, the Company and Constellation have "different interpretations" of their respective obligations under the Eastern Edison/Constellation wholesale standard offer contracts. Under Constellation's interpretation, it has flexibility to deliver wholesale standard offer power to any point on the NEPOOL PTF System and MECo bears the cost of bringing the power to its service territory. MECo alleges that it will incur additional transmission congestion costs bringing this power to its service territory with the implementation of the Independent System Operator-New England ("ISO-New England") standard market design (SMD") and the locational marginal pricing ("LMP") mechanism that went into effect on March 1, 2003. In order to resolve their dispute, MECo and Constellation have agreed that customers will pay additional costs on a fixed per-kWh basis in exchange for Constellation's agreement to deliver wholesale standard offer power directly to MECo's load centers.

II. FERC, Not The Department, Has Jurisdiction Over The Contract Amendments.

The contracts at issue are wholesale contracts involving the sale of power for resale in interstate commerce.[3] Wholesale power contracts come under the jurisdiction of the Federal

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[2] MECo has not filed in this docket the two other Eastern Edison wholesale standard offer contracts with TransCanada Power Marketing, Ltd., entered into on April 7, 1998 and NRG Energy Power Marketing entered into on October 13, 1998. The "uniqueness" of the original Eastern Edison wholesale standard offer contracts is a question of fact.

[3] "All Standard Offer Service delivered by Supplier to the Companies hereunder shall be sales

(continued…)

Energy Regulatory Commission ("FERC") and are subject to the Commission's jurisdiction and review under sections 205 and 206 of the Federal Power Act. Federal law, however, does not preempt the Department from inquiring into the prudence of the retail seller of electricity in choosing the source of its supply and in incurring particular costs. *Commonwealth Electric Company v. Department of Public Utilities*, 397 Mass. 361 (1986), cert. denied 481 U.S. 1036 (1987). In addition, G.L. c. 164, § 94A provides that:

> No gas or electric company shall hereafter enter into a contract for the purchase of gas or electricity covering a period in excess of one year without the approval of the department, unless such contract contains a provision subjecting the price to be paid thereunder for gas or electricity to review and determination by the department in any proceeding brought under section ninety-three or ninety-four, . . .
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> The department is authorized to exempt any electric or generation company from any or all of the provisions of this section upon a determination by the department, after notice and a hearing, that an alternative process or incentive mechanism is in the public interest.

G.L. c. 164 § 94A.

On December 15, 1998, Eastern Edison and Montaup filed an amended petition in D.T.E. 97-105 requesting a determination by the Department that Eastern Edison was exempt from filing any and all contracts for standard offer service under G.L. c. 164, § 94A, because an alternative process or incentive mechanism exists that is in the public interest. In particular, Eastern Edison sought such a determination with respect to the two wholesale standard offer service agreements that are the subject of this proceeding.

On March 22, 1999, the Eastern Edison, Montaup, and the Attorney General filed a Stipulation and Agreement with the Department that resolved all of the issues in D.T.E. 97-105, including Department review of the two wholesale standard offer power agreements that are the subject of this proceeding. *See* Attachment. The Parties asked the Department exempt the wholesale standard offer agreements between Eastern and Constellation from further review and approval under G.L. c. 164, § 94A, because "the FERC's continuing jurisdiction with respect to these Standard Offer Agreements constitutes the alterative process that is in the public interest." D.T.E. 97-105, p. 8. Eastern Edison/Montaup and the Attorney General agreed that: "[t]he Standard Offer Agreements were negotiated pursuant to the Restructuring Settlement Agreements, which were reviewed and approved by the Department in D.T.E. 96-24, and are an integral part of the approvals granted by FERC in allowing Montaup Electric Company to terminate its all-requirements contract with Eastern." Stipulation ¶ 7, pp. 7-8. The "[p]arties acknowledge that the FERC will have continuing jurisdiction under the Federal Power Act to

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[3](…continued)
for resale, with the Companies reselling such Standard Offer Services." Contract, Article 5, p. 7.

investigate and supervise the enforcement of all aspects of the Restructuring Settlement Agreement." D.T.E. 97-105. Accordingly, the Department found that the Stipulation was a just and reasonable resolution of the issues presented in this docket, and thus, that it is in the public interest.[4]

Consistent with D.T.E. 97-105, the FERC, not the Department, has jurisdiction over the proposed amendments and National Grid's request for additional cost recovery. The Department should instruct the Company to make a FERC filing if it seeks an amendment to the Eastern Edison Standard Offer contract. The wholesale restructuring agreement requires Montaup, its successors or assigns to provide Eastern with Standard Offer Service at specific prices adjusted only for a fuel index. "The prices shown . . . shall be for electricity **delivered to the meter** of Eastern's ultimate customer, ..." and do not provide for the recovery of congestion costs from customers. Eastern Edison Restructuring Settlement Agreement, D.P.U. 96-24 Volume 2, pp. 14-15 (emphasis added). The risk of loss in regards to the provision of Standard Offer Service has been assigned to Montaup and its successors or assigns as part of the termination of its all-requirements contract with Eastern.[5] FERC has continuing jurisdiction over these contracts.

III. MECo's Request To Recover Additional Standard Offer Costs Violates The Terms Of The Eastern Edison Electric Restructuring Settlement Agreement Approved by The Department In D.P.U. 96-24.

On May 16, 1997, Eastern Edison and Montaup submitted a comprehensive Restructuring Settlement Agreement ("Settlement") designed to provide resolution of the issues in restructuring EUA in furtherance of the Department's competitive market structure objectives. On December 23, 1997, the Department issued an Order on the Company's Settlement and found that it is consistent or in substantial compliance with Chapter 164 of the Acts of 1997 and that it represents, on balance, a just and reasonable resolution of restructuring issues for the Company and its ratepayers, and thus is in the public interest. *Eastern Edison Company*, D.P.U./D.T.E. 96-24, at 112 (1997).

The plain language of the settlement does not allow for the recovery of additional standard offer costs. The retail restructuring agreement states that Eastern Edison will provide "[a] standard offer service during a transition period that is fixed for the period through

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[4] The Stipulation and Agreement further provides that "[t]he rights conferred and obligations imposed on any party by this Stipulation shall be binding on or inure to the benefit of their successors in interest or assignees as if such successor or assignee was itself a party hereto." Stipulation ¶ 13, pp. 5. The National Grid companies are bound by this Stipulation.

[5] To abrogate its contractual obligations to provide Standard Offer Service at the agreed to kWh charges, National Grid must demonstrate to FERC that its contracts are contrary to the public interest. *See United Gas Pipeline Company v. Mobil Gas Service Corporation*, 350 U.S. 332 (1956) (*Mobil*); *Federal Power Commission v. Sierra Power Company*, 350 U.S. 348 (*Sierra*) (collectively *Mobil-Sierra*). The purpose of the power given to FERC by Section 206(a) of the Federal Power Act is the protection of the public interest, as distinguished from the private interests of the utilities.

December 31, 2004 **subject only to a fuel index**, . . . at specified per kWh charges that are set forth in the accompanying schedule." (emphasis added). Under the settlement, Eastern Edison was afforded management discretion in regards to contracting for standard offer service. Whether Eastern Edison made or lost money on standard offer service was irrelevant to its obligation to provide the service at specified prices. National Grid bought EUA, and its obligations, and should be required to comply with the restructuring settlement agreement.

IV. The Department Should Conduct A Prudence Inquiry

The Department has not reviewed the Eastern Edison wholesale standard offer contracts pursuant to G.L. c. 164, § 94A. Therefore, prior to the pass through of additional standard offer costs, the Department should conduct a prudence review. *Commonwealth Electric Company v. Department of Public Utilities*, *supra*. MECo must establish that it was prudent to enter into wholesale standard offer contracts that "contain unique language not found in any of the Company's other Standard Offer agreements" prior to the recovery of additional costs from customers. Petition 2. At least one other Massachusetts utility has entered into wholesale standard offer contracts at the same time and allocated the risk of congestion to the supplier. *See Western Massachusetts Electric Company*, D.T.E. 01-36/02-20. A factual record is needed before the Department can determine whether the proposed amendments are in the public interest.

V. The Department Should Deny MECo's Request For Confidential Treatment

MECo has filed a Motion for Confidential Treatment of the two Eastern Edison/Constellation wholesale standard offer agreements and the amendment to the original agreements. MECo also requests confidential treatment of the identity of the standard offer supplier. MECo has failed to establish the need to keep both the contract terms and the identity of the suppliers confidential.

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D. This statute permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review.

The Department has protected the identity of winning bidders for Default Service Contracts for a limited time. *See Western Massachusetts Electric Company*, (Motion for Confidential Treatment May 14, 2003 default service filing. However, "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer." *See Boston Edison Company,* D.T.E. 99-16, p. 4 (1999) citing *Standard of Review for Electric Contracts*, D.P.U. 96-39, at 2, Letter Order (August 30, 1996). In this docket, the identity of the standard offer suppliers is already public information. The contracts and supplier names are clearly identified in the Department's order in D.T.E. 97-105. The record in 97-105 is unclear as to whether the contracts where filed and are already public. MECo has the burden of demonstrating that the contracts are not already

public.[6] The Attorney General understands why standard offer bidding information may arguably be confidential, to protect the utility's bargaining position, but once a contract is entered into, rates charged customers should not be based on secret information. MECo has failed to meet its burden under G.L. c. 25, § 5D.

VI. Conclusion

The Department should deny MECo's attempt to change jurisdiction over the standard offer contracts and impose $3.2 million/year in additional costs on standard offer customers. In addition, the Department should deny confidential treatment for the contracts and the amendments.

Respectfully submitted,

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cc: Amy G. Rabinowitz, Esq.
Service List

[6] The Attorney General can find no Department order granting confidential treatment to the MECo Standard Offer Contracts or the identity of the suppliers. *See Massachusetts Electric Company*, D.P.U./D.T.E. 97-94 (1998). *See also New England Power Company* et.al, Docket Nos. EC98-1-000 and ER98-6-000, 82 FERC ¶ 61,179 (1998) (FERC approval of divestiture).